WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION

WASHINGTON, DC

ORDER NO. 3914

IN THE MATTER OF: Served March 25, 1992

Application of MADISON LIMOUSINE SERVICE, INC., for a Certificate of Authority -- Irregular Route Operations) Case No. AP-91-39

By application accepted for filing on November 12, 1991, Madison Limousine Service, Inc. (Madison or applicant), a Virginia corporation, seeks a Certificate of Authority to transport passengers, together with mail, express, and baggage in the same vehicles as passengers, in irregular route operations between points in the Metropolitan District, restricted to transportation in vehicles with a manufacturer's designed seating capacity of 15 or fewer persons, including the driver.

The Commission denied Madison's application in Order No. 3891, finding Madison unfit as to regulatory compliance, and assessing a civil forfeiture against Madison for its knowing and willful transportation of passengers for hire in the Metropolitan District without a Certificate of Authority.[1]

Madison filed an Application for Reconsideration of Order No. 3891 on March 3, 1992. As grounds for reconsideration, Madison argues that: (A) the Commission has no authority to assess a civil forfeiture; (B) the Commission violated Madison's fundamental right to due process of law; (C) the Commission lacks any factual basis to impose a penalty; (D) the Commission decision lacks any precedent; (E) the Commission has effectively promulgated a new rule without affording notice or an opportunity for comment; and (F) Madison's gratuitous service is not transportation for hire.

Madison's certificate of service states that the Application for Reconsideration was served by mail, on March 3, 1992, on protestant, Air Couriers International Ground Transportation Services, Inc., trading as Passenger Express. Protestant's reply was due no later than March 12, 1992.[2] On March 12, Protestant informed Staff that it had not received a copy of Madison's application until March 11 and that it intended to file the next day a reply and request for extension of time to file. On March 13, Protestant filed a Request for Leave to Late File Reply, supported by affidavit and seeking an extension until March 18. Protestant filed its reply on March 18.

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[1] In re Application of Madison Limo. Serv., No. AP-91-39, Order No. 3891 (Feb. 24, 1992).

[2] See Commission Rule No. 27-03 (seven day reply period when application served by mail); Rule No. 7-01 (Saturdays & Sundays not counted).

I. DISCUSSION

A. Madison's Gratuitous Service is Transportation for Hire Within the Meaning of the Compact

In Order No. 3891, the Commission found that Madison is a commercial carrier for hire, that Madison refers to its current passengers as customers, that Madison charged these customers for transportation between Washington Dulles International Airport (Dulles) and Washington, DC, before its certificate was revoked and will do so again if its certificate is reinstated, and that Madison's transportation of flight crews between Dulles and Washington, DC, is a continuation of its previously certificated operations.[3] We concluded that this is transportation for hire, notwithstanding the temporary absence of any charge, citing in support the decision in Unique Freight Lines Co. v. White Tiger Trans. Co., 618 F. Supp. 216 (S.D.N.Y. 1985).[4] Madison does not question our findings of fact on this issue.[5]

The carrier in White Tiger transported a shipment of goods without charge as a favor to the shipper.[6] Part of the shipment was missing when the goods reached their destination.[7] The issue was whether this particular shipment was subject to the jurisdiction of the Interstate Commerce Commission (ICC) so that the shipper could bring an action for damages in federal court under the Interstate Commerce Act (Act).[8] The court held the Act applied despite the

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[3] Order No. 3891 at 4 & nn.10-12.

[4] Order No. 3891 at 4 & n.13.

[5] Indeed, Madison notes on the first page of its Application for Reconsideration that it is "a carrier specializing in the transportation of airline flight crews between Dulles International Airport and hotels in Virginia and the District of Columbia." Madison continues to refer to these passengers as its customers. Application for Reconsideration at 2.

[6] 618 F. Supp. at 217.

[7] Id.

[8] See id. The plaintiff in White Tiger sought to recover under 49 U.S.C. § 11707, which at subsection (a)(1) provides in pertinent part (emphasis added):

> A common carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under subchapter I, II, or IV of chapter 105 of this title and a freight forwarder shall issue a receipt or bill of lading for property it receives for transportation under this subtitle. That carrier or freight forwarder and any other common carrier that delivers the property and is providing transportation or service subject to the jurisdiction of the Commission under subchapter I, II, or IV are liable to the person entitled to recover under the receipt or bill of lading.

carrier's argument that "since no bill of lading or charge was issued for the shipment, it was not a common carrier for hire . . . . ."[9] The parallels to the case at bar are obvious.

As the Commission held in Order No. 3891, White Tiger and Order No. 3810, revoking Madison's Certificate of Authority, stand for the proposition that "the for-hire nature of a commercial carrier's enterprise is not nullified simply because that carrier does not collect or charge a fare."[10] Madison's argument to the contrary is supported solely by a citation to Black's Law Dictionary. Madison would have the Commission overlook its factual findings, ignore White Tiger, overrule Order No. 3810, and reverse Order No. 3891 on the strength of a dictionary definition. We think that ill-advised and affirm our holding that Madison's gratuitous service is transportation for hire within the meaning of the Compact.

B. The Compact Authorizes Administrative Assessment of Civil Forfeitures

The Compact, Title II, Article XIII, Section 6(f)(iii) provides that "Civil forfeitures shall be paid to the Commission with interest as assessed by the court." In addition, the Compact, Title I, Article X, Section 2 provides that "[i]n accordance with the ordinary rules for construction of interstate compacts, [the Compact] shall be liberally construed to effectuate its purposes." Applying the ordinary rules of statutory construction, the limiting phrase, "as assessed by the court," should be construed to modify only the last antecedent, "interest."[11] Hence, only interest would be assessed by the court, not the underlying forfeiture. Interest would be necessary only if the assessed party did not pay the forfeiture promptly and court action were required to enforce the Commission's order.

This construction effectuates purposes for which the Compact was amended. Prior to amendment of the Compact, effective February 1, 1991, a carrier's operating authority could be suspended or revoked at the administrative level -- putting the carrier completely out of business -- but a simple $50 fine required a criminal conviction.[12] This anomaly has been removed. The Commission now may apply its expertise in fashioning an appropriate remedy when suspension or revocation either is unwarranted or has failed, as in the instant case, which is particularly important now that the standard for granting a certificate has been lowered from "public convenience and

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[9] 618 F. Supp. at 217 (emphasis added).

[10] Order No. 3891 at 3 & n.9 (emphasis added) (citing Air Couriers Int'l Ground Trans. Servs. v. Madison Limo. Serv., No. FC-90-02, Order No. 3810 at 6 (Aug. 30, 1991); White Tiger).

[11] FTC v. Mandel Bros., Inc., 359 U.S. 385, 389 & n.4 (1959).

[12] Compare Compact, Pub. L. No. 86-794, 74 Stat. 1031, Title II, Art. XII, § 4(g) (1960) with id., Title II, Art. XII, § 18(d).

necessity" to "consistent with the public interest."[13] At the same time, administrative efficiency has been enhanced and an unnecessary burden removed from the judiciary.

Madison's reading, which proceeds from an oversimplified analysis of the section, runs contrary to the ordinary rules of construction and would defeat purposes for which the Compact was amended. Accordingly, we affirm our holding implicit in Order No. 3891 that the Compact authorizes administrative assessment of civil forfeitures.

C. The Evidence Establishes Madison's Knowing and Willful Violation of the Compact

A finding that Madison "knowingly and willfully" violated the Compact is a prerequisite to the Commission's assessment of civil forfeiture.[14] "Knowingly" means with "perception of the facts necessary to bring the questioned activity within the prohibition of the [Compact]" not "awareness that such activity is in fact prohibited."[15] "Willfully" connotes intentional disregard.[16] Evidence of former prosecutions for similar violations is extremely probative of willful disregard.[17]

Our revocation of Madison's Certificate of Authority marked the second time we found Madison in willful violation of the Compact for operating without authority.[18] At that point, Madison should have ceased all transportation in our jurisdiction. It did not. Instead, it knowingly and willfully continued to transport the same airline personnel between the same two points in the Metropolitan District.

Madison's assertion that this was not a knowing and willful violation of the Compact does not square with our rejection of Madison's argument in the revocation proceeding -- which Madison makes again here -- that its gratuitous transportation of airline personnel is not transportation for hire. Madison made that argument through prior counsel at page three of its post-hearing brief:

> Respondent does not deny transporting ANA's flight crews from Dulles Airport into the District of Columbia

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[13] Compare, Compact, Pub. L. No. 101-505, 104 Stat. 1300, Title II, Art. XI, § 7(a)(ii) (1990) with Compact, Pub. L. No. 86-794, 74 Stat. 1031, Title II, Art. XII § 4(b) (1960).

[14] Compact, Title II, Article XIII, § (6)(f)(i).

[15] Union Petroleum Corp. v. United States, 376 F.2d 569, 573 (10th Cir. 1967); United States v. Key Line Freight, 481 F. Supp. 91, 95 (W.D. Mi. 1977), aff'd, 570 F.2d 97 (6th Cir. 1978).

[16] United States v. Illinois Cent. R.R., 303 U.S. 239, 243 (1938).

[17] United States v. T.I.M.E. - D.C., 381 F. Supp. 730, 741 (W.D. Va. 1974).

[18] Order No. 3891 at 5.

> on occasion but the evidence (tr. pp. 33 and 84-85) is absolutely uncontested that these were gratuitous transports as Respondent was never paid for them! The Compact quite clearly states (Title II, Article XI, Section 1). "This Act shall apply to the transportation for hire between any points in the Metropolitan District including . . . ." (emphasis supplied). It is beyond dispute that the term "hire" contemplates payment and in this case there was none . . . . In short, ANA got a 'freebie' for this service and the above cited portions of the transcript give ample support to this contention. Since no compensation was involved it must therefore follow that there are no grounds to justify a finding of a violation of Compact or of the Rules promulgated thereunder as no activity took place over which the Commission has jurisdiction.

We acknowledged in Order No. 3810 that Madison had provided gratuitous service to this particular customer but rejected Madison's conclusion that this service was not for-hire.[19] Madison, thus, was on notice that gratuitous transportation service may provide a valid basis for the Commission's jurisdiction and that, therefore, a plan to provide gratuitous service in the Metropolitan District without a Certificate of Authority might result in a violation of the Compact. Madison carried through with its plan in spite of this knowledge. This meets the test for willfulness.[20]

Madison argues that it practiced no deception or subterfuge and sought the guidance of the Commission's Staff. The Commission does not ascribe any evil purpose to Madison's conduct, but moral turpitude is not an element of the offense,[21] and we see no evidence of eleemosynary intent. We see a carrier which has consciously and persistently refused to confine its commercial operations to the scope of its authority, despite a cease and desist order and revocation of its certificate. We, therefore, affirm our holding that Madison's violation of the Compact was knowing and willful.

D. All Affected Parties Have Received the Process They are Due

The Commission recognizes that an assessed party must be given notice of violation and an opportunity to defend before it may be compelled to pay. Madison was afforded both.

The issue of whether Madison's post-revocation, gratuitous transportation service violated the Compact was raised by Protestant at page six of the protest:

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[19] Order No. 3810 at 6.

[20] Intercounty Constr. Co. v. Occupational Safety & Health Review Comm'n, 522 F. 2d 777, 780 (4th Cir. 1975), cert. denied, 423 U.S. 1072 (1976).

[21] Illinois Cent. R.R., 303 U.S. at 242-43.

> Second, assuming that Madison is making no current charge for such services, are those services truly not "for hire" services, or is there other consideration passing between the parties which would bring those services within the jurisdiction of the Commission. For example, is the continuation of passenger carrier service for existing clients with the understanding that such clients will continue to be clients if authority is granted such consideration under the law as to render the services being provided by Madison "for hire" rather than exempt or otherwise not subject to regulation.

Madison admitted in its reply to providing "its customers with gratuitous transportation between Dulles Airport and Washington, D.C." after its certificate had been revoked. Without citing any authority in support, Madison argued that this was not transportation for hire. Madison opposed the protest on the ground that it raised "no issues or facts not already known to the Commission." Madison likewise opposed the Protestant's request for oral hearing on the ground that Protestant had not shown why the evidence it sought "could not be adduced without the expense and delay of an oral hearing." Madison then declared it would introduce evidence of its own at a later date. We accepted Madison's late-filed evidence because it was substantially what would have been adduced at hearing had one been granted.[22]

The issue having been joined and there being no question of material fact, summary disposition was appropriate. Madison will not be heard to complain, having resisted a hearing earlier. We have weighed all of Madison's arguments on reconsideration. Indeed, this is the third time we have entertained its argument that gratuitous transportation service is not transportation for hire. Madison has had its day in court.

As for Madison's contention that the Commission has promulgated a new rule without notice and comment, we note that the so-called "rule" is merely Madison's interpretation of Order No. 3891 under alternative scenarios. Since the resolution of this case is not dependent on our application of Order No. 3891 to those situations, we decline to decide whether Madison's interpretation is correct.

For the foregoing reasons, we hold that Order No. 3891 meets the test for due process.

II. CONCLUSION

In consideration of the above, the Commission affirms Order No. 3891 in its entirety.

THEREFORE, IT IS ORDERED:

1. That the Application for Reconsideration of Madison Limousine Service, Inc., is hereby granted for the limited purpose of affirming Order No. 3891.

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[22] Order No. 3891 at 3.

2. That all other relief is denied.

3. That the Request for Leave to Late File Reply of Air Couriers International Ground Transportation Services, Inc., trading as Passenger Express, is hereby granted for good cause.

4. That Order No. 3891 is affirmed.

BY DIRECTION OF THE COMMISSION; COMMISSIONERS DAVENPORT, SCHIFTER AND SHANNON:

William H. McGilvery
Executive Director